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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 478

C. G. LEWELLYN, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

vs.

DIAMOND ALKALI COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 26, 1932

CERTIORARI GRANTED DECEMBER 5, 1932

(37175)

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1 In United States District Court, Western District of Pennsylvania

Docket entries

Aug. 25, 1928, præcipe for for summons filed. Statement of claim filed. Summons issued.

Aug. 27, 1928, summons returned served on C. G. Lewellyn at Pittsburgh, on Aug. 27, 1928.

Sept. 10, 1928, affidavit of service of statement filed.

Sept. 21, 1928, præcipe for appearance of John D. Meyer and John A. McCann for defendant filed.

Nov. 9, 1928, affidavit of defense filed.

Jan. 14, 1929, plaintiff's reply to the new matter alleged in defendant's affidavit of defense filed.

Jan. 15, 1929, hearing on preliminary matters.

Jan. 21, 1929, stipulation waiving jury trial filed. Trial opens, before Gibson J., without a jury.

Jan. 22, 1929, trial continues.

Jan. 23, 1929, trial continues. Motion for judgment for plaintiff filed. Motion for judgment for defendant filed.

Jan. 24, 1929, trial closed. Trial memo. filed.

Feb. 5, 1929, transcript of testimony filed.

2 Feb. 23, 1929, plaintiff's request for findings of fact filed at No. 5762 Law.

Feb. 10, 1930, opinion and order filed and entered directing that judgment be entered for the plaintiff and against the defendant in the sum of $11,371.32.

Pursuant to the above order, judgment is hereby entered for the plaintiff, Diamond Alkali Company, against the defendant, C. G. Lewellyn, former collector of internal revenue, in the sum of $11,371.32.

J. Wood Clark, *Clerk.*

Feb. 14, 1930, on motion of plaintiff, order entered vacating the above judgment entered on Feb. 10, 1930; allowing the plaintiff to file an amendment to its statement of claim; and directing that judgment be entered for the plaintiff and against the defendant in the sum of $13,106.40 with interest thereon from Dec. 15, 1920; exception reserved to defendant and bill sealed.

Feb. 14, 1930, amendment to statement of claim filed.

Feb. 14, 1930, pursuant to the above order, judgment is hereby entered in favor of the plaintiff, Diamond Alkali Company, and against the defendant, C. G. Lewellyn, former collector of internal revenue, in the sum of $13,106.40, with interest thereon from Dec. 15, 1920.

J. Wood Clark, *Clerk.*

Apr. 23, 1930, certificate of probable cause filed.

May 13, 1930, on petition of C. G. Lewellyn, order entered allowing appeal. Assignments of error filed. Order of court filed and entered permitting defendant until Wednesday, May 28, 1930, to file bills of exception. Citation issued.

May 27, 1930, stipulation for printing appeal record filed.

May 27, 1930, on stipulation, order entered allowing and settling certain matter in the bill of exceptions in the case at No. 5762 law, together with certain other matter in this case, as the bill of exceptions in this case.

In United States District Court

Statement of Claim

Filed Aug. 25, 1928

Diamond Alkali Company, the above-named plaintiff, has a claim against C. G. Lewellyn, formerly collector of internal revenue for the twenty-third district of Pennsylvania, defendant, for the sum of $7,340.26, with interest thereon from the 15th day of December, 1920, upon a cause of action whereof the following is a statement:

1. Diamond Alkali Company, the plaintiff, is, and at all
4 times herein mentioned was, a corporation organized and existing under the laws of the State of West Virginia, with its principal office in the city of Pittsburgh in the Commonwealth of Pennsylvania.

2. C. G. Lewellyn, the defendant, was, from the 1st day of October, 1914, until the 31st day of July, 1921, the duly appointed, qualified, and acting collector of internal revenue for the twenty-third district of Pennsylvania and now resides in the city of Pittsburgh and within said western district.

3. For the year 1919 the plaintiff kept its books of account on the accrual basis and filed its Federal income and profits-tax return on the accrual and calendar year basis.

4. On the 12th day of May, 1920, the plaintiff duly filed its said return for 1919 and paid to the defendant as collector of internal revenue for the twenty-third district of Pennsylvania the income and profits taxes appearing by said return to be owing to the Government of the United States, to wit, $711,379.02.

5. Only $702,571.12 of said tax of $711,379.02 was in fact owing and $8,807.90 thereof was an overpayment. Said overpayment was made by plaintiff to defendant on or about December 15, 1920. $1,467.64 thereof has been allowed to plaintiff as a credit on alleged additional taxes for 1918, leaving a net overpayment of $7,340.26.

6. By letter dated July 11, 1927, the Commissioner of In-
5 ternal Revenue (hereinafter called the "commissioner") notified the plaintiff that its income and profits tax return for 1919 was erroneous; that he, the commissioner, had made divers

changes and adjustments in the plaintiff's tax liability and in the figures on which the same was computed; and that as the result of such changes and adjustments plaintiff had overpaid the sum of $1,467.64.

7. The change and adjustment which resulted in alleged overpayment of $1,467.64 instead of the correct amount of overpayment, $8,807.90, was as follows: Redetermination of the plaintiff's allowance for the amortization of war-time facilities under section 234 (a) (8) of the revenue act of 1918 in the sum of $387,224.40 instead of permitting the same to stand at $1,344,465.15 as determined at the time and in the manner hereinafter described, whereby the plaintiff's deduction from 1919 gross income on account of said allowance was changed from $99,016.94 to $18,202.10.

8. Said tax of $711,379.02 and the assessment and collection thereof were and are erroneous, illegal, and void to the extent of $8,807.90. Annexed hereto, marked Exhibit 1, and made part hereof is a correct statement of the plaintiff's income and profits tax liability for the year 1919, showing the amount actually owing, the amount the plaintiff was compelled to pay, and the amount of tax paid by plaintiff in excess of the amount owing and for the recovery of which this suit is brought.

9. At all times up to and including the third day of March,
6 1924, the amortization section of the Income Tax Unit and the employees thereof had full charge on the part of the commissioner of audit, investigation, and consideration of claims by taxpayers under section 234 (a) (8) of the revenue act of 1918 and section 234 (a) (8) of the revenue act of 1921 for allowances on account of amortization of war-time facilities, and at all such times the chief or acting chief of said section had full power and authority from the commissioner, as plaintiff avers on information and belief, to determine the amount of such allowances and give notice of such determinations to the claimants, and as a matter of regular routine and practice did make such determinations and give such notices with full knowledge, acquiescence, and approval on the part of the commissioner and without consideration or action by the commissioner personally.

10. Plaintiff constructed, erected, installed, and acquired on or after April 6, 1917, certain buildings, machinery, equipment, and other facilities for the production of articles contributing to the prosecution of the war with Germany, and at the time of filing its said return, plaintiff duly made claim for deduction from gross income under section 234 (a) (8) of the revenue act of 1918 on account of amortization of war-time facilities, which claim was subsequently revised by the plaintiff, and the revised claim for $1,756,453.64 filed with the commissioner on or about September 10, 1921. Said sum of $1,756,453.64 was and is the correct amortization allowance to which the plaintiff was as a matter of fact entitled, and $269,451.86 thereof was deductible from plaintiff's gross income for 1919.

7 11. In the month of September, 1921, the commissioner, acting by the authorized officials of said amortization section, sent his representative, one F. R. Griffith, an engineer in said amortization section, to the plaintiff's properties with written instructions and authority to examine the same, investigate the facts and matters set out in the plaintiff's said revised claim, audit said claim in the light of such investigation, and submit a report and determination of the plaintiff's allowance under section 234 (a) (8) of the revenue act of 1918 to said amortization section.

12. Said Griffith carried out his said instructions and on or about October 23, 1921, made a detailed written report to said amortization section covering his said examination, investigation, and audit and his findings of fact in the course thereof, and containing a determination that the plaintiff was entitled to an allowance under said section 234 (a) (8) in the sum, as plaintiff avers on information and belief, of $1,344,465.15, of which $1,245,448.21 should be deducted from 1918 gross income and $99,016.94 from 1919 gross income.

13. In the ordinary and usual course of business of the Income Tax Unit and said amortization section thereof, said report and determination came for review before one B. L. Wheeler, chief of engineers in said amortization section and duly authorized by the commissioner in that behalf, and upon such review and consideration thereof the said B. L. Wheeler approved said report and deter-

8 mination in all respects, and on or about December 1, 1921, signified his approval in writing endorsed on said report.

14. On or about the 1st day of December, 1921, and in the ordinary and usual course of business of the Income Tax Unit and said amortization section, said report and determination came for final action before one T. J. S. Kishpaugh, acting chief of said amortization section and, as plaintiff avers on information and belief, authorized by the commissioner to take such final action and to make determination of the plaintiff's allowance with the same effect as if by the commissioner personally, and said Kishpaugh then and there approved said report and determination and signified his approval by endorsement in writing on said report.

15. On or about the 10th day of January, 1922, a copy of said report and determination, with said endorsements thereon, was delivered to the plaintiff by said amortization section on behalf of and with the authority of the commissioner and, notwithstanding that the correct allowance was $1,756,453.64 as aforesaid, was nevertheless accepted by the plaintiff without further objection.

16. The plaintiff never thereafter requested a reexamination of its said returns with respect to said allowance. The commissioner did not thereafter at any time before March 3, 1924, reexamine said return with respect to said allowance, or determine that said

9 allowance of $1,344,465.15 was erroneous, or make or begin or cause to be made or begun any new investigation or reexamination of said allowance, or make any appraisal, or obtain any other evidence, or take any further action, or do any other thing whatso-

ever in respect to said allowance. On the contrary, plaintiff avers on information and belief that from the time of said approval of said determination of $1,344,465.15 by said acting chief of section as above described to on or about October 1, 1924, no further proceedings were had or taken with respect to plaintiff's amortization allowance, the same having been finally and definitely determined as hereinbefore averred.

17. On or about October 1, 1924, some person in said amortization section unknown to the plaintiff assigned the matter of said allowance for reexamination. No reexamination or reinvestigation was made or begun, however, until on or about April 1, 1925, when one Luce, an engineer in said amortization section, made an investigation and examination of plaintiff's properties; and on or about November 4, 1925, said Luce made a report to said amortization section covering his investigation and examination, and containing an alleged determination of plaintiff's said allowance at $468,812.30. On or about November 4, 1925, said amortization section sent to the plaintiff a copy of said report and determination entitled "Redetermination of Taxpayer's Claim for Amortization."

18. On or about November 17, 1926, the plaintiff received
10 from said amortization section a paper entitled "Second Redetermination of Amortization Claim," wherein the plaintiff's said allowance was alleged to be determined at $387,224.40, of which $369,022.30 was apportioned to 1918 and $18,202.10 to 1919.

19. Said alleged "Second Redetermination" was used by the commissioner in computing the plaintiff's net income and tax for 1919 as stated in his said letter of July 11, 1927.

20. Plaintiff is advised by counsel and therefore avers that it was and is lawfully entitled to said allowance in the sum of $1,344,465.15 regularly and finally determined as above described, and to deduction of $99,016.94 thereof from its 1919 gross income, and that said two subsequent alleged redeterminations under the circumstances above set forth, and being subsequent to March 3, 1924, were and are in violation of section 234 (a) (8) of the revenue act of 1921, and of no legal effect whatsoever, and plaintiff further avers that the said alleged redeterminations were not based upon any new and material evidence or any mathematical error or mistake or the discovery of any fraud in the original determination theretofore made.

21. On or about the 11th day of March, 1925, the plaintiff filed with the commissioner, on the form prescribed by him for that purpose, claim for refund of said overpayment of tax in the sum of $8,807.90 on the ground that said tax and the assessment and collection thereof were erroneous, illegal, and void to the extent of
11 said overpayment, but on or about July 11, 1927, the commissioner rejected said claim except $1,467.64 thereof.

22. Except for $1,467.64, no part of said overpayment of $8,807.90 has been repaid or refunded to the plaintiff.

Wherefore, this suit is brought and plaintiff claims judgment against the defendant for the sum of $7,340.26, with interest thereon from the 15th day of December, 1920.

SMITH, SHAW & MCCLAY,
Attorneys for Plaintiff.

Duly sworn to by W. E. Jones; jurat omitted in printing.

12 *Exhibit 1 to statement of claim*

1919

Net income			$2,680,498.64
Excess profits tax @ 18.31% of net income as determined by commissioner			490,799.30
Income tax:			
Income		$2,680,498.64	
Less exemptions—			
Liberty bond interest	$69,981.11		
Excess profits tax	490,799.30		
Specific exemptions	2,000.00		
		562,780.41	
Taxable @ 10%		2,117,718.23	211,771.82
Correct tax liability			$702,571.12
Paid with return			711,379.02
Overpayment			$8,807.90
Allowed by commissioner as credit against tax for 1918 on 11/15/27			1,467.64
Tax overpaid			$7,340.26

13 In United States District Court

Affidavit of defense

Filed Nov. 9, 1928

C. G. Lewellyn, defendant above named, alleges that he has a full, just, true, and legal defense to all of the plaintiff's statement of claim; and that the defense is of the following character:

1. Defendant admits the allegations contained in paragraph 1 of the statement of claim.

2. Defendant admits the allegations contained in paragraph 2 of the statement of claim.

3. Defendant admits the allegations contained in paragraph 3 of the statement of claim.

4. Defendant admits the allegations contained in paragraph 4 of the statement of claim.

5. In answer to the allegations contained in paragraph 5 of the statement of claim, defendant denies that only $702,571.12 of said tax of $711,379.02 was in fact owing and denies that $8,807.90 thereof was an overpayment. On the contrary, defendant alleges that $709,911.38 was in truth and in fact due and owing from plaintiff as

income and excess profits taxes for the year 1919; and that the correct amount of said overpayment for said year was in fact $1,467.64, the amount allowed to plaintiff, leaving no net overpayment. Defendant admits that said $8,807.90 (mentioned in
14 said paragraph 5 and herein above described), being part of said $711,379.02 above mentioned, was paid to the defendant on or about December 15, 1920.

6. The allegations of paragraph 6 of the statement of claim are admitted. But defendant alleges that the tax of the plaintiff for the years 1918, 1919, and 1920, respectively, was in process of audit by the Commissioner of Internal Revenue continuously from the respective dates of the filing of plaintiff's tax returns for said years to July 11, 1927. Said letter of July 11, 1927, stated only the final adjustments made in said tax liability of the plaintiff.

7. In answer to the allegations contained in paragraph 7 of the statement of claim, defendant denies that the correct amount of said overpayment was $8,807.90, but, on the contrary, alleges said overpayment was in truth and in fact $1,467.64. Defendant admits that said overpayment of $1,467.64 resulted from the determination of plaintiff's allowance for amortization of war-time facilities pursuant to section 234 (a) (8) of the revenue act of 1918 in the sum of $387,224.40. Defendant denies, however, that said determination was a redetermination, and denies that said allowance was at any time determined at $1,344,465.15, or any other sum than $387,224.40. On the contrary, defendant alleges said determination of the said amortization allowance at $387,224.40 was the only amortization allowance at any time actually determined by the Commissioner of Internal Revenue.

15 Defendant denies that plaintiff's allowance for the year 1919 as a deduction for said amortization was changed by any determination whatsoever from $99,016.94 to $18,202.10, but, on the contrary, defendant alleges that said allowance was determined only once (as provided by law) as above set forth and that, by said determination, plaintiff's claimed allowance of $99,016.94 was reduced to $71,267.51; and that said determination was in all respects correct, just, and legal.

8. In answer to the allegations contained in paragraph 8 of the statement of claim, defendant denies that said tax of $711,379.02, and/or the assessment and/or the collection thereof were in any sense erroneous, illegal, or void, except as to $1,467.64 thereof; but on the contrary alleges that said tax, its assessment, and its collection were in all respects correct, legal, and valid, except that $1,467.64 thereof constituted an overpayment (subsequently allowed to the plaintiff). Defendant denies that Exhibit I, attached to the statement of claim and made a part of it, is a correct statement of plaintiff's income and profits tax liability for the year 1919; denies that the exhibit shows the amount actually owing; and denies that it shows the amount of tax paid by the plaintiff in excess of the amount owing. On the

contrary, defendant alleges that the true amount of plaintiff's income and excess profits taxes for the year 1919 was $709.911.38, which was the sum lawfully assessed and actually collected from the plaintiff for said year.

16 9. In answer to the allegations contained in paragraph 9 of the statement of claim, defendant denies that at any time up to the third day of March, 1924, the amortization section of the Income Tax Unit and/or the employees thereof had full charge on the part of the Commissioner of Internal Revenue of the audit, investigation, and/or consideration of claims by taxpayers pursuant to section 234 (a) (8) of the revenue act of 1918, or section 234 (a) (8) of the revenue act of 1921 for allowance on account of amortization of war-time facilities. On the contrary, defendant alleges that, in truth and in fact, at all times the function performed by said amortization section was merely to make investigations, examinations, and recommendations as to the allowance of said claims; and that these recommendations were subject to further audit and review by the Bureau of Internal Revenue.

Defendant denies that at any time, the chief or acting chief of said section had any power or authority from the Commissioner of Internal Revenue to determine the amount of such allowances or to give notices of such determinations to claimants. Defendant also denies that said chief or acting chief of said section made such determination and/or gave such notices, either as a matter of routine or practice, or at all; or that said chief or acting chief did make such determination and/or give such notices, either with or without the knowledge, acquiescence, or approval of the said commissioner, or without consideration or action by the commissioner, personally.

17 On the contrary, defendant alleges that said chief and/or acting chief had no power or authority to determine the amount of such allowances; that the power to determine the allowable deductions under section 234 (a) (8) of the revenue act of 1918 and under section 234 (a) (8) of the revenue act of 1921 for amortization of war-time facilities was vested in the Commissioner of Internal Revenue at all times herein mentioned; that the report and recommendation of said amortization section was subject to audit and review by various audit and review sections of the Bureau of Internal Revenue; that before any allowance was actually made or became final and before said allowance became a determination pursuant to said sections of said revenue acts, respectively, said allowance and proposed determination was, both in theory and practice, subject to the approval of the Commissioner of Internal Revenue acting in person or through the assistant to the Commissioner of Internal Revenue. Defendant admits that, as a matter of practice and regular routine, notice of the report and recommendation of the amortization section was delivered to the plaintiff.

10. In answer to the allegations contained in paragraph 10 of the statement of claim, defendant admits that plaintiff constructed,

erected, installed, and acquired on or after April 6, 1917, certain buildings, machinery, equipment and other facilities for the production of articles contributing to the prosecution of the war with Germany, and at the time of filing its said return, plaintiff duly made claim for deduction from gross income under section 234 (a) (8) of the revenue act of 1918 on account of amortization of war-
18 time facilities, which claim was subsequently revised by the plaintiff, and the revised claim for $1,756,453.64 filed with the commissioner on or about September 10, 1921. Defendant denies that said sum of $1,756,453.64 was or is the correct amortization allowance to which plaintiff was, as a matter of fact, entitled and denies that $269,451.56 of plaintiff's allowable deduction was deductible from plaintiff's gross income for the year 1919. On the contrary, defendant alleges that, in truth and in fact, the correct amount of plaintiff's amortization allowance under said section was and is $387,224.40, of which $71,267.51 was deductible from plaintiff's gross income for the year 1919.

11. In answer to the allegations contained in paragraph 11 of the statement of claim defendant admits that in the month of September, 1921, the commissioner, acting by the authorized officials of said amortization section, sent his representative, one F. R. Griffith, an engineer in said amortization section, to the plaintiff's properties with written instructions and authority to examine the same, investigate the facts and matters set out in the plaintiff's said revised claim, audit said claim in the light of such investigation, and submit a report of the plaintiff's allowance under section 234 (a) (8) of the revenue act of 1918 to said amortization section. Defendant denies that said engineer was authorized or directed to make a determination of the amount of plaintiff's allowance for amortization under section 234 (a) (8) of the revenue act of 1918. On the contrary, defendant alleges that the sole power of said engineer
19 was to investigate and to report on the allegations contained in said claim.

12. In answer to the allegations contained in paragraph 12 of the statement of claim, defendant admits that said Griffith carried out his instructions and, on or about October 23, 1921, made a detailed report to said amortization section covering his said examination and investigation. Defendant denies that said Griffith ever made a determination of plaintiff's amortization allowance in any amount whatsoever and denies that said report constituted a determination that plaintiff was entitled to any allowance under said section 234 (a) (8) of the revenue act of 1918. On the contrary, defendant alleges that said report was merely a recommendation of said Griffith that plaintiff be allowed an amortization deduction in the amount of $1,344,465.15, of which $99,016.94 would be deductible from gross income for the year 1919.

13. In answer to the allegations contained in paragraph 13 of the statement of claim, defendant admits that in the ordinary and usual

course of business of the Income Tax Unit, said report came for review before one B. L. Wheeler, chief of engineers, in said amortization section; and admits that, upon such review and consideration thereof the said B. L. Wheeler approved said report and, on or about December 1, 1921, signified his approval in written endorsement thereon. Defendant denies that said B. L. Wheeler and/or said Griffith determined or were authorized to determine
20 plaintiff's amortization allowance in any sum whatsoever; denies that said report constituted a determination of plaintiff's amortization allowance; denies that any determination came on for review before said B. L. Wheeler; and denies that said B. L. Wheeler approved any determination thereof. On the contrary, defendant alleges said report was a mere recommendation which was approved by said B. L. Wheeler.

14. In answer to the allegations contained in paragraph 14 of the statement of claim, defendant admits that on or about the first day of December, 1921, in the ordinary and usual course of business of the Income Tax Unit, said report came on for review and action before one T. J. S. Kishpaugh, acting chief of said amortization section, and that said Kishpaugh then and there approved said report and signified his approval in written endorsement thereon. Defendant denies that said report constituted a determination of plaintiff's amortization allowance; denies that said report and/or any determination of plaintiff's amortization allowance came for final action before said Kishpaugh; denies that said Kishpaugh had any authority or power to make any determination or to take any final action relative to plaintiff's allowance with the same effect as if made by the Commissioner of Internal Revenue personally. On the contrary, defendant alleges: that said report constituted a mere recommendation relative to the amount of amortization allowance deductible by the plaintiff; that the action of said Kishpaugh was merely a concurrence in the recommendation thus previously
21 made; that said Kishpaugh had no power or authority on behalf of the Commissioner of Internal Revenue to take any final action relative to plaintiff's amortization allowance or to determine it; and that the action of said Kishpaugh was subject to further audit and review in the Bureau of Internal Revenue as herein above set forth.

15. In answer to the allegations contained in paragraph 15 of the statement of claim, defendant admits that a copy of said report with endorsements thereon, was delivered to plaintiff by said amortization section with the authority of the Commissioner of Internal Revenue. Defendant denies that said report was delivered on January 10th, 1922, and alleges it was delivered on or about December 2, 1921. Defendant denies that the correct deduction allowance to plaintiff on account of amortization of war-time facilities was $1,756,453.64. On the contrary, defendant alleges the correct amount

thereof was $387,224.40, which was in all respects fair and reasonable. Defendant denies that said report was accepted by plaintiff without further objection, and alleges that plaintiff expressed a willingness on numerous occasions, to accept it, provided its "case" could thereupon be closed. Defendant further alleges that said report appears upon its face to be merely a recommendation relative to plaintiff's amortization claims and to be subject to further audit and review; and that, at the time a copy of said report was delivered to the plaintiff, the plaintiff was advised that the report was subject to review and only a recommendation subject to the matters therein contained.

22 16. In answer to the allegations contained in paragraph 16 of the statement of claim, defendant denies that plaintiff never thereafter requested a further examination of its said returns with respect to said allowance. On the contrary, defendant alleges that plaintiff, thereafter, in briefs filed by it, requested the commissioner to make further adjustments in its said amortization allowance. Defendant admits that the commissioner did not thereafter, at any time prior to March 3, 1924, commence a reexamination of said returns with respect to said allowance, but defendant alleges that the first reexamination of said return with respect to said allowance was begun in the year 1921 and had not been completed on March 3, 1924, and was not completed until several years thereafter. Defendant denies that the commissioner did not determine that said allowance of $1,344,465.15 was erroneous and alleges that said amortization allowance was never determined at such sum. Defendant denies that the commissioner did not, subsequent to March 3, 1924, make further investigations and examinations and take further action with respect to plaintiff's amortization allowance. To the contrary, defendant alleges that plaintiff's said returns and plaintiff's claim for amortization allowance were continuously, from the year 1921 to a time long subsequent to March 3, 1924, in process of audit, investigation, and consideration. Defendant denies that no further proceedings were had or taken with respect to plaintiff's amortization allowance after said Griffith's report and the recommendation therein contained had been approved by said acting chief of the amortization section

23 in the amount of $1,344,465.15, on or about October 1, 1924. On the contrary, defendant alleges that said claim was continuously in process of audit as above set forth. Defendant further denies said report or its approval by said section officer constituted a determination and alleges that said allowance for amortization was not actually determined until it was approved and allowed by the assistant to the commissioner on, or about, July 11, 1927.

17. In answer to the allegations contiined in paragraph 17 of the statement of claim, defendant admits that on or about October 1, 1924, some person in the amortization section assigned the matter of plaintiff's claim for further examination. Defendant denies that

the claim was assigned for reexamination within the meaning of section 234 (a) (8) of the revenue act of 1918 or section 234 (a) (8) of the revenue act of 1921, and alleges that said further examination was a continuance of the audit thertofore begun. Defendant denies that no reexamination or reinvestigation was made, or begun, until on or about April 1, 1925, and alleges that the one and only reexamination and reinvestigation of plaintiff's return was commenced prior to March 3, 1924, and ended subsequently thereto. Defendant admits that one Luce, an engineer in said amortization section, made an investigation and examination of plaintiff's properties on or about April 1, 1925, and that on or about November 4, 1925, he made a report to said section covering his investigation and examination. Defendant denies said report was a determination of
24 any kind and alleges that (as appears on the face thereof) it was a mere recommendation regarding plaintiff's said claim to the effect that it be determined at $468,812.30; and that said report was subject to further review. Defendant admits that, on or about November 4, 1925, said amortization section sent to the plaintiff a copy of said report entitled "Redetermination of taxpayer's Claim for Amortization."

18. In answer to the allegations contained in paragraph 18 of the statement of claim, defendant admits that, on or about November 17, 1926, plaintiff received from said amortization section, a paper entitled "Second Redetermination of Amortization Claim." Defendant denies that plaintiff's said allowance was alleged therein to be determined at $378,224.40 (of which $369,022.30 was apportioned to the year 1918 and $18,202.10 to the year 1919). On the contrary, defendant alleges said report constituted a mere recommendation, and showed, on its face, that it was subject to further review.

19. In answer to the allegations contained in paragraph 19 of the statement of claim, defendant admits that the recommendation contained in said alleged and so-called "Second Redetermination" was approved by the commissioner and used by him in computing plaintiff's net income and tax for the year 1919, as stated in said letter of July 11, 1927. Defendant further alleges that the total deduction allowable for plaintiff for amortization of war-time facilities for the year 1919 was $71,267.51.

25 20. In answer to the allegations contained in paragraph 20 of the statement of claim, defendant denies that plaintiff is lawfully entitled to said amortization allowance in the sum of $1,344,465.15; denies that said allowance was in any way determined and/or allowed at such an amount; and denies that plaintiff is entitled to a deduction of $99,016.94 thereof from its 1919 gross income. On the contrary defendant alleges said allowance was correctly determined at $387,224.40 and that of the latter amount, plaintiff is entitled to a deduction of $71,267.51 from its gross income for the year 1919. Defendant denies that two "subsequent" redeterminations were made at all and alleges that only one determination was made as

herein above set forth in that plaintiff's claim was not finally determined until the action of the assistant to the commissioner on July 11, 1927, as herein above described. Defendant denies that the reports of the engineers of the amortization section constituted determinations within the purview of section 234 (a) (8) of the revenue act of 1918, or section 234 (a) (8) of the revenue act of 1921; and alleges that said reports were recommendations of the subscribers thereto and endorsers thereof that plaintiff's said claim be allowed in the amounts stated in said reports. Defendant denies that the report and recommendation upon which the commissioner based his determination of the amount of plaintiff's amortization allowance was not based on any new or material evidence or mathematical error or mistake. On the contrary, defendant alleges said report and the said determination were based on new and additional evidence;
26 that said Griffith erred in the recommendation made by him in his report; that his report was based on the assumed fact that several plant units of plaintiff were no longer required by plaintiff in the operation of its business, whereas, in truth and in fact, said plant units were but temporarily idle and were required by plaintiff in the operation of its business; that said investigation and report of F. R. Griffith was made during a period of temporary business depression and did not reflect the normal condition of plaintiff's business during the post-war period; that, upon field investigation subsequent to said Griffith's report, it was discovered that the cost upon which amortization had been recommended was greatly in excess of the true amount thereof.

21. In answer to the allegations contained in paragraph 21 of the statement of claim, defendant admits that on or about March 11, 1925, the plaintiff filed with the commissioner, a claim for refund of taxes paid for the year 1919. Defendant denies that said claim was for the sum of $8,807.90, and alleges that it was for the sum of $45,000.00. Defendant denies that said claim was filed on the ground that said tax and assessment and collection thereof were erroneous, illegal, and void to the extent of said alleged overpayment and avers that said claim was filed on the following grounds (reference therein being made to briefs thereafter to be filed by the plaintiff):

"This claim is filed as a protection against the running of the statute of limitations.

"The questions involved are affiliations, depreciation, deple-
27 tion, valuation of contracts and other items; also, relief under provisions of sections 327 and 328."

22. In answer to the allegations contained in paragraph 22 of the statement of claim, defendant admits that, except for $1,467.64 no further sums have been refunded to the plaintiff. It is denied, however, that plaintiff has overpaid its taxes for said year in any amount in excess of said refund heretofore made to the plaintiff.

FIRST SEPARATE DEFENSE

As a further and separate defense to the allegations contained in the statement of claim, defendant alleges that:

23. This court is without jurisdiction to review the action of the said commissioner in computing plaintiff's profits tax for the year 1919 under said sections 327 and 328.

24. This court is without jurisdiction to compute plaintiff's profits tax for the year 1919 at 18.31% of plaintiff's net income, as said income is sought to be revised by the allegations of the statement of claim.

SECOND SEPARATE DEFENSE

As a further and second separate defense to the allegations contained in the statement of claim, defendant, at this point incorporates herein the allegations of the "First separate defense" as fully as if here set forth in detail, and further alleges that:

28 25. The amounts of profits tax due from the plaintiff for the years 1918 and 1919, respectively, were computed by the Commissioner of Internal Revenue pursuant to the provisions of sections 327 and 328 of the revenue act of 1918; for the year 1919, plaintiff's profits tax was computed under said sections to be 18.31% of its net income for that year; that, if the income and/or invested capital found by the said commissioner to be plaintiff's true income and invested capital for said year are in any way modified by court action, then the profits tax due from the plaintiff for the year 1919 may not be computed under said sections 327 and 328 of the revenue act of 1918 by any court, but must be computed under section 301 of the revenue act of 1918, provided that the court has jurisdiction to compute them at all.

26. There is now pending in this court an action by this plaintiff, against D. B. Heiner, collector of internal revenue for the twenty-third district of Pennsylvania (No. 5762 law), wherein plaintiff seeks to recover $1,164,015.33, collected from it as income and excess profits taxes for the years 1918 and 1920, inclusive. Said suit is based, in part, upon an alleged erroneous redetermination of plaintiff's allowable deduction for amortization of war-time facilities and upon an alleged erroneous disallowance, in part, of plaintiff's claim for depreciation for said years. After plaintiff's return for 1918 had been filed, it filed a revised claim for amortization in the amount of $1,756,453.64. Thereafter, said claim was disallowed in the sum of $1,369,229.24 and allowed in the sum of $387,224.40. Plain-

29 tiff also then claimed, as a deduction from gross amount for the year 1918, depreciation in the amount of $876,366.71. Upon audit of plaintiff's said return, the commissioner disallowed depreciation in the sum of $439,104.16 and allowed said deduction for the balance. Plaintiff's invested capital was thereupon increased in the amount that said claims were disallowed, said amounts being restored to invested capital for the year 1919. If, in said action